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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,
v.
MICHELLE CISNEROS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. INTRODUCTION

Petitioner, UNUM Life Insurance Company of America ("UNUM"), submits this Reply Brief to respond to the Brief in Opposition filed by respondent Michelle Cisneros ("Ms. Cisneros").

As set forth in UNUM's Reply Brief in *Ward*,[1] the need to grant certiorari has become even more pressing since UNUM filed its petitions in the *Cisneros* and *Ward* cases. In *O'Connor v. UNUM Life Ins. Co. of America*, No. 97-

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[1] *Ward v. UNUM Life Ins. Co. of America*, 135 F.3d 1276 (9th Cir. 1998), petition for certiorari filed, 66 U.S.L.W. 3773 (U.S. May 20, 1998) (No. 97-1868).

5244, 1998 U.S. App. LEXIS 15117 (D.C. Cir. July 7, 1998)[2], discussed in the *Ward* Reply Brief, still another appellate court has filed a decision deepening the acknowledged Circuit conflict over the standard for application of ERISA's "saving" clause for state insurance regulation.

II. THE WRIT SHOULD BE GRANTED IN VIEW OF THE IRRECONCILABLE CIRCUIT CONFLICTS

A. The Ninth Circuit's Overly-Expansive Standard For The "Saving" Clause Creates A Significant Circuit Conflict Which Can Only Be Resolved By This Court.

The Brief in Opposition takes the position that no conflict exists because only two Circuits have addressed whether California's "notice-prejudice" rule is "saved" from ERISA preemption, and both of them—the Ninth and District of Columbia Circuits—have held that it is "saved." This, of course, is a sleight-of-hand. By narrowing the focus to the issue of whether one state law rule from a single state will apply to insured ERISA plans, the Brief tries to minimize the importance of the acknowledged Circuit conflict over the standard for application of ERISA's "saving" clause, a conflict which can only be resolved by this Court.

In fact, the core issue is the vastly expanded standard for application of ERISA's "saving" clause adopted by the Ninth Circuit. By holding for the first time since the enactment of the McCarran-Ferguson Act that a state common-law rule of general application which directly impacts plan administration and benefit payment can regulate the "business of insurance" without engaging in the risk shifting activity which Congress viewed as the essence of that definition, *Union Labor Life Ins. Co. v. Pireno*,

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[2] The defendant in *O'Connor* will request the D.C. Circuit by August 14, 1998 to stay the mandate pending this Court's disposition of the cert. petitions in the *Ward* and *Cisneros* cases.

458 U.S. 119, 127 (1982), the decision exposes insured ERISA plans to virtually unlimited state law regulation. The Ninth Circuit's new standard is so broad and indiscriminate that it will arguably preserve virtually any common-law rule of general application that can be identified with the insurance industry. This is true even though the common-law rule clashes with ERISA's substantive provisions, including its fiduciary responsibility rules and exclusive civil enforcement scheme, which make the administration of insured plans " 'exclusively a federal concern.' " *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) (citation omitted). *See John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 99 n. 9 (1993) ("No decision of this Court has applied the savings clause to supersede a provision of ERISA itself.")

As UNUM demonstrates in its Reply Brief filed in *Ward*, the "notice-prejudice" rule is merely a basic principle of contract law involving a duty to cooperate, a principle which applies to all contracts, not only insurance policies. Unlike the mandated-benefits statute in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the California rule does not transfer the risk of loss or satisfy any of the other McCarran-Ferguson standards; it purports to "regulate[ ] the *administration* of policies, *not* their substantive terms",[3] and it merely shifts the legal risks that would arise when a claim is asserted under the contract.

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[3] See *Smith v. Jefferson Pilot Life Ins. Co.*, 14 F.3d 562, 570 (11th Cir.), *cert. denied*, 513 U.S. 808 (1994) (emphasis added) (ERISA preempts statute requiring notice for cancellation of insurance coverage to be effective); *Davies v. Centennial Life Ins. Co.*, 128 F.3d 934, 942 (6th Cir. 1997) (ERISA does not "save" state statute permitting rescission of insurance policy where plan participant made willful misrepresentation; statute did not transfer risk of loss or "affect the substantive terms of the insurance contract.")

California has numerous rules dealing with interpretation of insurance contracts, *e.g., Delgado v. Heritage Life Ins. Co.,* 157 Cal.App.3d 262, 271 (1984) (exclusions and limitations in an insurance policy are "strictly construed against the insurer and liberally interpreted in favor of the insured"); *Willden v. Washington Nat'l Ins. Co.,* 18 Cal.3d 631, 635 (1976) ("process of nature rule" relates disability date to the time of the accident); *Erreca v. West. States Life Ins. Co.,* 19 Cal.2d 388, 396 (1942) (case law defines "total disability"). California law also makes an insurer "forfeit" certain policy rights, *Sarchett v. Blue Cross of Calif.,* 43 Cal.3d 1 (1987) (violation of covenant of good faith and fair dealing caused forfeiture of policy's arbitration clause), and has special limitations on rescission of insurance contracts, *e.g.,* California Insurance Code, § 10350.2. None of these laws "spread risk," but all are, arguably at least under the Ninth Circuit's expansive standard, preserved by the "saving" clause even though they directly impact plan administration and benefit payment.

Prior to *Cisneros,* it was well-established in every Circuit that common-law rules of general application which failed to transfer the risk of loss but impacted plan administration and benefit payment would not be preserved by ERISA's "saving" clause. *See, e.g., Evans v. Safeco Life Ins. Co.,* 916 F.2d 1437, 1440 (9th Cir. 1990) (state laws of insurance contract interpretation generally preempted). Now, in the District of Columbia and states within the Ninth Circuit, these common-law rules—and many other similar laws—will each have to be judicially tested to determine their fit within the Ninth Circuit's expanded "saving" clause standard. To the extent these laws are found to be preserved even though they do not transfer the risk of loss—or to the extent that insured plans apply them out of an abundance of caution—plans will be administere ddifferently from one jurisdiction to the next, and benefit determinations will differ on the same

jurisdictional lines. And, of course, increased litigation will be spawned by this uncertainty as to which laws apply.

In short, the Ninth Circuit—in acknowledged conflict with other Circuits—adopted a "saving" clause standard in *Cisneros* and *Ward* which exposes the administration and benefit payment of insured plans to virtually unlimited state regulation by common-law rules of general application which fail to satisfy all three of the McCarran-Ferguson criteria, or even the first criterion—the transfer of risk of loss. *This* is the acknowledged split created by the Ninth Circuit's decisions, and amplified by *O'Connor,* and the significant issue which only this Court can resolve.

B. The Ninth Circuit's Standard Is At Odds With Decisions By This Court And Numerous Other Circuits.

Extracting a line of dictum from *Pireno* that none of the McCarran-Ferguson criteria "is necessarily determinative in itself," the Brief in Opposition contends both that the *Cisneros* decision is consistent with the Supreme Court's treatment of ERISA's "saving" clause and that any conflict in the Circuits on the proper scope of this clause is minimal.

In fact, *Cisneros* and *O'Connor* are not consistent with the Supreme Court's treatment of ERISA's "saving" clause. This Court has called the spreading and underwriting of a policyholder's risk the "primary elements" of an insurance contract, an "indispensable characteristic of insurance," and " 'the one earmark of insurance as it has commonly been conceived of in popular understanding and usage.' " *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 211-212 (1979) (quoting *SEC v. Variable Annuity Life Ins. Co.,* 359 U.S. 65, 73 (1959)). Under *Pireno,* all three factors must be considered in determining whether a law fits within the narrow "business of insurance" exception from antitrust law. This is certainly not the same, as the Brief in Opposition contends, as a holding that a law could be "saved" where any

one of these criteria was not met—especially the first prong, given *Pireno*'s recognition that the "spreading of risk" is synonymous with the "business of insurance." *Pireno*, 458 U.S. at 127. *See also Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 39 (1996) (observing that the spreading of risk lies "at the core of . . . McCarran-Ferguson . . . concerns").

This characterization of the transfer of risk as an "indispensable" element of insurance has been consistently applied and, until *Cisneros*, there was not a single reported ERISA decision holding that a state common-law rule regulated the "business of insurance" where it did not also spread the risk of loss.[4] The broad, indiscriminate nature of the Ninth Circuit's "saving" clause standard, coupled with the vast number of state laws potentially within its sweep, will only cause this acknowledged Circuit conflict to continue to magnify, unless checked by this Court.

C. The "Saving" Clause Should Be Interpreted In Light Of ERISA's Express Purpose of Governing The Administration Of All ERISA Plans Under Uniform Federal Regulation.

The Brief in Opposition argues that *Cisneros'* impact on the uniform federal regulation of ERISA plans should not be considered because Congress intended this result when it enacted the "saving" clause. This is circular reasoning. Ms. Cisneros first offers an expanded and distorted view of the "saving" clause far broader than the limited exception intended by Congress, and then argues

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[4] The Brief in Opposition's contention that, in *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), this Court held that a law that did not spread risk would have been saved from preemption but for application of the "deemer" clause is simply incorrect. At issue in *Holliday* was an anti-subrogation law, with the Court being explicit that its application would have required providers to calculate benefit levels differently. 498 U.S. at 60. As such, the law would clearly impact "the risks of injury that the insurance company will bear for the insured," *Smith*, 14 F.3d at 569.

that the resulting chaos is of no moment because Congress must have intended it by enacting this insurance exception.

ERISA expressly subjects the administration and benefit payment of both insured and self-funded plans to uniform, nationwide federal regulation. ERISA §§ 401-404, 502-503, 29 U.S.C. §§ 1101-1114, 1132-1133; *Pilot Life*, 481 U.S. at 45-46. This Court is "obliged in interpreting the savings clause to consider . . . the role of the saving clause in ERISA *as a whole*." *Id.* at 51 (emphasis added). One of ERISA's chief purposes is to preempt state laws that "mandate[ ] employee benefit structures or their *administration*," *"prohibit"* what is "permitted" by federal law, "preclude *uniform administrative practice*," or provide *"alternate enforcement mechanisms."* *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657, 658 (1995) (emphasis added).

ERISA's primary goal of uniform federal regulation of fiduciary standards, plan administration and civil enforcement is, accordingly, among the reasons this Court should grant the writ and reject the Ninth Circuit's overly broad "saving" clause standard. In addressing a similar issue, the Eleventh Circuit noted the importance of uniform application of ERISA, stating that this Court "has not hesitated 'to apply ERISA's preemption clause to state laws that risk subjecting plan administrators to conflicting state regulations.' " *Smith v. Jefferson Pilot Life Insurance Co.*, 14 F.3d 562, 571 (11th Cir.) (quoting from *FMC Corp.*, 498 U.S. at 59), *cert. denied*, 513 U.S. 808 (1994). Properly echoing *Pilot Life*, 481 U.S. at 51, the *Smith* court concluded that courts should apply "the three-pronged business of insurance test in light of the purposes underlying ERISA." 14 F.3d at 571. In view of ERISA's goal to make plan administration and benefit payment " 'exclusively a federal concern,' " *Pilot Life*, 481 U.S. at 45-46 (citation omitted), the statute cannot be interpreted, as the Ninth Circuit has done, as preserving

state common-law rules of general application which not only directly impact plan administration and benefit payment but also fail to transfer the risk of loss or meet the other McCarran-Ferguson criteria.

D. The Decision Below Is Not Interlocutory.

Lastly, Ms. Cisneros, without citation of authority, states that the decision below is "interlocutory" because only a remand order, and not a final judgment, is being challenged. This is sheer nonsense. The Ninth Circuit's "saving" clause holding is conclusive in the litigation and, therefore, the judgment on the issue is deemed "final." *See Herrington v. County of Sonoma,* 706 F.2d 938, 939 (9th Cir. 1983) (lower court's abstention ruling was a "final decision" because "the impact here was to send [plaintiff] 'effectively out of court' ") (citation omitted).[5]

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[5] In *Cisneros,* the district court is ordered to remand this matter to the plan administrator, an action which, in the Ninth Circuit at least, would be appealable as a "final judgment" under 28 U.S.C. § 1291, rather than as an interlocutory judgment under § 1292. *See Snow v. Standard Insurance Co.,* 87 F.3d 327, 330 (9th Cir. 1996) (taking jurisdiction of similar remand order as a final judgment under § 1291). The Ninth Circuit's treatment of such a remand order as a "final" judgment, rather than an "interlocutory" order, is consistent with *Sullivan v. Finkelstein,* 496 U.S. 617, 625 (1990) (district court decision invalidating Social Security administrative regulations, and remanding for factual findings, was "unquestionably a judgment" rather than an interlocutory order).

III. CONCLUSION

In view of the acknowledged and still-growing Circuit conflict over the standard for application of ERISA's "saving" clause and the great significance of the issue nationwide, petitioner urges that the writ of certiorari be granted.

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